**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|---|---|---|
| **REBECCA S. MATIN** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 236,835 |
| **OUTSIDE CONNECTIONS, INC.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **CGU INSURANCE COMPANY** | ) | |
| **WAUSAU INSURANCE COMPANY** | ) | |
| Insurance Carriers | ) | |

## ORDER

Respondent and its insurance carrier, CGU Insurance Company, appeal from an Award entered by Administrative Law Judge Steven J. Howard on January 12, 2000. The Appeals Board heard oral argument June 20, 2000.

### APPEARANCES

James E. Martin of Overland Park, Kansas, appeared on behalf of claimant. Jeffrey S. Nichols of Overland Park, Kansas, appeared on behalf of respondent and insurance carrier CGU Insurance Company. David J. Bogdan of Kansas City, Missouri, appeared on behalf of respondent and insurance carrier Wausau Insurance Company.

### RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

The Administrative Law Judge found claimant is entitled to benefits for a 42 percent permanent partial disability based on functional impairment. He found the date of accident to be June 15, 1998, claimant's last day of work, and on that basis ordered benefits paid by Commercial Union, now CGU, the carrier on the risk for that date of accident. The issues on appeal are:

1. Should the award be modified on the grounds that claimant has unreasonably refused to undergo treatment for her injury?

2. Did claimant's disability preexist the period of Commercial Union's coverage?

3. Should the award be limited by the $50,000 cap for award based on functional impairment in K.S.A. 44-510f(a)(4)?

Claimant raises the following additional issues:

1. Should respondent be ordered to pay interest pursuant to K.S.A. 44-512b for unreasonable refusal to pay the benefits before the award?

2. What is the date of accident? Claimant contends the ALJ erroneously used June 15, 1998, as the first day claimant was taken off work for the carpal tunnel syndrome and uses that date as the date of accident when, in fact, claimant was taken off work July 15, 1998.

3. Claimant challenges the constitutionality of the cap set in K.S.A. 44-510f(a)(4) for awards based on functional impairment.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the award should be modified by limiting the award to $50,000 based on the cap found in K.S.A. 44-510f(a)(4), the date of accident should be July 15, 1998, and the compensation rate adjusted accordingly. The award should be affirmed in all other respects.

## Findings of Fact

1. Claimant, a registered nurse, worked as executive director for respondent Outside Connections, a non-profit agency that provides services to children and families of people in prison. Claimant raised funds, wrote grants, wrote contracts, and supervised respondent's staff of 22 to 23 people. Claimant's duties required that she work on a computer keyboard a substantial portion of her day.

2. In 1994 claimant developed tingling in her upper extremities and saw Dr. Marie Palmeri. Dr. Palmeri prescribed Ibuprofen and braces at night. At this time, claimant decreased the keyboard work and began working more in the field. The symptoms improved and claimant did not need further medical care.

3. Claimant injured her knee and back in late 1997, injuries not involved in this claim. As a result of these injuries, claimant was off work from February to early May 1998.

4. Claimant started doing more computer keyboard work again in October and November 1997, after the back and knee injuries but before she was off work. The symptoms in her upper extremities returned and while off work for the back and knee injuries, claimant requested treatment for her upper extremities. She made the request to Mr. Ernest Green. He checked with the insurance carrier, at that time Wausau, and was told they wanted to resolve the back and knee injuries before addressing the upper extremities. When claimant returned to work in May 1998, the upper extremity symptoms became severe. Claimant again requested medical care and was sent to Dr. Bruce Silverberg.

5. Dr. Silverberg ordered an EMG study and, based on the results, recommended surgery for bilateral carpal tunnel syndrome. Surgery was scheduled twice and both times claimant changed her mind. Claimant was first off work because of the upper extremity injuries beginning July 15, 1998.

6. Claimant has since returned to work for respondent at a lesser wage and with the keyboard duties assigned to secretarial help.

7. Claimant was seen by Dr. Lynn D. Ketchum at the request of claimant's counsel. Dr. Ketchum agreed that claimant should have surgery for bilateral carpal tunnel syndrome. He rated the impairment as 42 percent of the whole person.

8. Claimant was seen by Dr. Daniel M. Downs pursuant to order by the ALJ. Dr. Downs opined that it was not medically reasonable not to address the carpal tunnel condition and stated surgery would, even with fair results, reduce the impairment to between 10 and 20 percent. Dr. Downs rated the current impairment as 42 percent of the whole person. He concluded that 60, 70, or 80 percent of the impairment existed in 1993.

9. Wausau provided workers compensation insurance coverage for respondent from May 10, 1997, through May 10, 1998.

## Conclusions of Law

1. The award should not be modified based on claimant's refusal to undergo surgery. This question is governed by K.A.R. 51-9-5. That regulation provides:

> An unreasonable refusal of the employee to submit to medical or surgical treatment, when the danger to life would be small and the probabilities of a permanent cure great, may result in denial or treatment of compensation beyond the period of time that the injured worker would have been disabled had the worker submitted to medical or surgical treatment, but only after a hearing as to the reasonableness of such refusal.

The regulation mentions only treatment that would permanently cure and does not address treatment that might merely improve a condition. The result of the unreasonable refusal is termination of benefits. The Board notes several older Kansas appellate decisions that suggest unreasonable refusal of treatment that might only improve the injury should also affect the benefits awarded. *McCullough v. Southwestern Bell Telephone Co.*, 155 Kan. 629, 127 P.2d 467 (1942); *Gentry v. Williams Bros.*, 135 Kan. 408, 10 P.2d 856 (1932). But those decisions were rendered before the above-quoted regulation was adopted in 1966. In *Gutierrez v. Harper Construction Co.*, 194 Kan. 287, 398 P.2d 278 (1965), the court quotes the then director's rule 51-9-5, a rule that appears to have been the same in material respects as current regulation. The director's rule referred only to treatment that would permanently cure the claimant. In the *Gutierrez* case the court emphasized that there was no evidence the treatment would permanently cure claimant. The court made a similar analysis in *Morgan v. Sholom Drilling Co.*, 199 Kan. 156, 427 P.2d 448 (1967). In that case, the treatment at issue was back surgery that would likely reduce the impairment. The court noted there was no evidence the treatment would be a permanent cure. The same is true here. Respondent's request to reduce or terminate benefits because claimant has declined surgery should be denied.

2. The Board finds Wausau is not responsible for payment of any portion of the benefits. Claimant sustained injury caused by repetitive trauma over a period of time that includes a time when Wausau was providing coverage. The court decisions governing date of accident for repetitive trauma injuries fix responsibility for payment of permanent disability benefits based on the date of accident. *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). In this case, the date of accident was at a time when Commercial Union was the carrier and Commercial Union should be responsible for permanent disability benefits.[1]

3. The award should be limited to $50,000. K.S.A. 44-510f(a)(4) sets a $50,000 maximum for permanent partial disability benefits in cases where the disability is based on functional impairment. In this case, the award was based on functional impairment but claimant contends the limits should not apply to a series of injuries. The Board disagrees. Injury from repetitive trauma is in most other respects, including, for example, notice, written claim, date of accident, and average weekly wage, treated as a single accident. The Board concludes a repetitive trauma injury should be treated as a single accident for purposes of the maximum benefits provided in K.S.A. 44-510f(a)(4).

4. The Board denies claimant's request for an interest penalty pursuant to K.S.A. 44-512b. That statute allows an order for respondent to pay interest where, after a hearing on

---

[1] The recent decision by the Court of Appeals in *Sarah Lott-Edwards v. Americold Corporation and Wausau* assigns responsibility for medical care to the insurance carrier at the time the care is rendered but this decision does not, in our view, change the general rule that permanent disability benefits are paid by the insurance carrier on the date of accident.

the issue, it is determined that respondent unreasonably refused to pay benefits prior to any award. This issue appears to have been raised for the first time on appeal. The ALJ made no findings. The Board will not consider factual issues raised for the first time on an appeal.

5. The Board finds the date of accident should be July 15, 1998, and the maximum compensation rate, therefore, $366 per week. Claimant originally alleged June 15, 1998, as the date of accident based on a misunderstanding about when claimant left work because of her injuries. At the time of the regular hearing, claimant discovered the date was, in fact, July 15, 1998, and amended the claim. There does not appear to be any dispute on this issue.

6. The Board notes claimant has challenged the constitutionality of the cap on award for functional impairment. Claimant wishes to preserve the issue, acknowledging the Board does not have the authority to declare an act of the legislature to be unconstitutional.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Steven J. Howard on January 12, 2000, should be, and the same is hereby, modified.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Rebecca S. Matin, and against the respondent, Outside Connections, Inc., and its insurance carrier, CGU Insurance Company, for an accidental injury which occurred July 15, 1998, and based upon an average weekly wage sufficient for the maximum benefit, for 6 weeks of temporary total disability compensation at the rate of $366 per week or $2,196, followed by 136.61 weeks at the rate of $366 per week or $50,000, for a 42% permanent partial disability, making a total award of $52,196.

As of July 31, 2000, there is due and owing claimant 6 weeks of temporary total disability compensation at the rate of $366 per week or $2,196, followed by 100.71 weeks of permanent partial disability compensation at the rate of $366 per week in the sum of $36,859.86, for a total of $39,055.86 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $13,140.14 is to be paid for 35.9 weeks at the rate of $366 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this ____ day of July 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Overland Park, KS
Jeffrey S. Nichols, Overland Park, KS
David J. Bogdan, Kansas City, MO
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director